



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF:

JUN 18 2008

WC-15J

CERTIFIED MAIL 7001 0320 0006 1454 1400
RETURN RECEIPT REQUESTED

Mr. Michael Aukerman d/b/a
Michael Aukerman Excavating
3180 County Road 203
McComb, Ohio 45858

Subject: Notice of Proposed Assessment of a Class II
Administrative Penalty Pursuant to Section 309(g) of
the Clean Water Act
Docket No. **CWA-05-2008-0004**

Dear Mr. Aukerman:

Enclosed is a copy of an "Administrative Complaint", which I have issued against Michael Aukerman d/b/a/ Michael Aukerman Excavating, under the authority of Section 309(g) of the Clean Water Act ("Act"), 33 U.S.C. § 1319(g). In the Complaint, the U.S Environmental Protection Agency alleges that you and your company violated Section 405(e) of the Act. The Complaint describes the alleged violations in Counts I, II, III, and IV.

You may request a hearing regarding the violations alleged in the Complaint and the proposed administrative civil penalty. I invite you to pay particular attention to the section of the Complaint entitled "Notice of Opportunity to Request a Hearing." If you fail to request a hearing within 30 days of receipt of the Complaint, you waive the right to a hearing and may become liable for the entire proposed civil penalty. If you request a hearing, you may be represented by an attorney, or represent yourself at any point in these proceedings.

The rules governing these proceedings are the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits," 40 C.F.R. Part 22, 64 Fed. Reg. 40,138 (July 23, 1999). I have enclosed a copy for your reference.

Whether or not you or your company requests a hearing, I invite you to confer informally with EPA concerning the alleged violations and the amount of the proposed penalty. Again, you may be represented by an attorney at any conference, whether the meeting occurs in person or by telephone. EPA encourages all parties to pursue settlement during an informal conference. If the

parties reach a satisfactory settlement, a mutually negotiated and executed Consent Agreement and Consent Order will resolve this matter. The issuance of such a Consent Agreement and Consent Order will constitute a waiver by both you and your company of its right to a hearing on, and judicial appeal of, the agreed civil penalty.

A request for an informal conference does not extend the 30 days during which you may request a hearing on the proposed penalty assessment. You may pursue the two procedures simultaneously. If you wish to discuss settlement of this matter, please contact Valdis Aistars, Water Division (WC-15J), EPA, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604-3590, or telephone Mr. Aistars at (312) 886-0264. For questions regarding legal issues, please contact Richard R. Wagner, Senior Attorney at (312) 886-7947.

We urge your prompt attention to this matter.

Sincerely yours,



for Tinka G. Hyde
Acting Director, Water Division

Enclosures

cc: Mark Mann, OEPA
John Shoop, Director of Environmental Health, HCHD



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

JUN 18 2008

REPLY TO THE ATTENTION OF WC-15J

CERTIFIED MAIL 7001 0320 0006 1454 1394
RETURN RECEIPT REQUESTED

Mark Mann, Supervisor
Enforcement Unit - Division of Surface Water
Ohio Environmental Protection Agency
P.O. Box 1049
Columbus, OH 43216-1049

Subject: Notice of Proposed Administrative Assessment of
Class II Civil Penalty: Michael Aukerman d/b/a Michael Aukerman Excavating
Docket No. CWA-05-2008-0004

Dear Mr. Mann:

Enclosed is a copy of the administrative complaint which the U.S. Environmental Protection Agency has issued to Michael Aukerman, d/b/a Michael Aukerman Excavating (Aukerman), for violations of Section 405(e) of the Clean Water Act (Act). Region 5 has issued the Complaint to assess administratively a Class II civil penalty against Aukerman for violations of Section 405 of the Act. Because the violations have occurred in Ohio, EPA would like to offer you an opportunity to confer with us regarding the proposed assessment.

You may request a conference with EPA anytime within twenty (20) days of receipt of this letter. The conference may be in person or by telephone and may cover any matters relevant to the proposed assessment. A copy of EPA's procedures governing the assessment of Class II administrative penalties under the Act is also enclosed.

If you wish to request a conference or if you have any comments or questions regarding this matter, please call Valdis Aistars at (312) 886-0264. For questions regarding legal issues, please contact Richard R. Wagner at (312) 886-7947.

Sincerely yours,

for Tinka G. Hyde
Acting Director, Water Division

Enclosure

cc: Regional Hearing Clerk

RECEIVED
GENERAL INVESTIGATIVE
DIVISION
JUN 18 1964

No. CWA-05-2008-0004

4. Pursuant to section 405(d) of the CWA, 33 U.S.C. § 1345(d), the Administrator published the “Standards for the Use or Disposal of Sewage Sludge” on February 19, 1993, which have been codified, at 40 C.F.R. Part 503, with amendments.

5. That 40 C.F.R. § 503.2 provides that “[c]ompliance with the standards in this part shall be achieved as expeditiously as practicable, but in no case later than February 19, 1994.”

6. That 40 C.F.R. § 503.3(b) provides that: “No person shall use or dispose of sewage sludge through any practice for which requirements are established in this part except in accordance with such requirements.”

7. That Section 405(e) of the CWA, 33 U.S.C. § 1345(e), in part, provides that: “it shall be unlawful for any person to dispose of sludge from a publicly owned treatment works or any other treatment works treating domestic sewage for any use for which regulations have been established pursuant to subsection (d) of this section, except in accordance with such regulations.”

8. That Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), provides that: “Whenever, on the basis of any information available the Administrator finds that any person has violated . . . [section 405 of the CWA, 33 U.S.C. § 1345], . . . the Administrator . . . may, after consultation with the State in which the violation occurs, assess a . . . class II civil penalty under [section 309(g) of the CWA, 33 U.S.C. § 1319(g)].”

GENERAL ALLEGATIONS

9. That Respondent is a “person”, a term defined at section 502(5) of the CWA, 33 U.S.C. § 1362(5).

10. That in the course of conducting its business, in McComb County, Ohio, Respondent collected domestic septage, liquid and solid material from domestic septage tanks, cesspools, portable toilets or other waste collection devices, and applied that material to agricultural land.

11. That the materials collected by Respondent and applied to agricultural land, as identified in Paragraph 10, are “sewage sludge,” as defined by 40 C.F.R. § 503.9(w), and “domestic septage,” as defined by 40 C.F.R. § 503.9(f).

12. That the sources from which Respondent collected materials, identified in Paragraph 10, were “treatment works” as defined by 40 C.F.R. § 503.9(aa).

ALLEGED VIOLATIONS

Count I

Failure to Meet Recordkeeping Requirements (40 C.F.R. § 503.17(c))

13. That Paragraphs 1-12 are hereby incorporated by reference.

14. That 40 C.F.R. § 503.17(b) provides that:

When domestic septage is applied to agricultural land, forest, or a reclamation site, the person who applies the domestic septage shall develop the following information and shall retain the information for five years:

(1) The location, by either street address or latitude and longitude, or each site on which domestic septage is applied.

(2) The number of acres in each site on which domestic septage is applied.

(3) The date and time domestic septage is applied to each site.

(4) The nitrogen requirement for the crop or vegetation grown on each site during a 365 day period.

(5) The rate, in gallons per acre per 365 day period, at which domestic septage is applied to each site.

(6) The following certification statement:

"I certify, under penalty of law, that the pathogen requirements in [insert either § 503.32(c)(1) or § 503.32(c)(2)] and the vector attraction reduction requirements in [insert § 503.33(b)(9), § 503.33(b)(10), or § 503.33(b)(12)] have been met. This determination has been made under my direction and supervision in accordance with the system designed to ensure that qualified personnel properly gather and evaluate the information used to determine that the pathogen requirements and vector attraction reduction requirements have been met. I am aware that there are significant penalties for false certification including the possibility of fine and imprisonment."

(7) A description of how the pathogen requirements in either § 503.33(c)(1) or (c)(2) are met.

(8) A description of how the vector attraction reduction requirements in § 503.33(b)(9), (b)(10), or (b)(12) are met.

15. That in response to an Information Request issued to him by Complainant, on July 6, 2006, Michael Aukerman informed Complainant that he had no records relating to his application of septage in McComb County, Ohio.

16. That in response to a supplemental information request issued to him on August 16, 2006, by Complainant, Respondent acknowledged that, during the time he conducted his business, as described in paragraph 10, that being between June 2001, and July 2, 2006, Respondent applied domestic septage to agricultural land in McComb, Ohio, identified as follows:

- (a) 4470 County Road 203;
- (b) 7360 County Road 53;
- (c) 6349 County Road 53: and

(d) 3180 County Road 203.

17. That with regard to each instance in which Respondent applied domestic septage to agricultural land, as identified in Paragraph 16, Respondent failed to prepare records identifying the information he was required to prepare and keep, as provided for in 40 C.F.R. § 503.17(b).

18. That Respondent's failure to prepare and keep records, as identified in Paragraph 17, constitutes violations of 40 C.F.R. § 503.17(b), and, consequently, violations of Section 405(e) of the CWA, 33 U.S.C. § 1345(e), subjecting Respondent to civil penalties under Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1).

Count II

Failure to Meet Pathogen Requirements (40 C.F.R. § 503.15(b))

19. Paragraphs 1-18 are incorporated herein by reference.

20. That 40 C.F.R. § 503.15(b) provides that the pathogen requirements of 40 C.F.R. § 503.32(c)(1) or (c)(2) shall be met when domestic septage is applied to agricultural land, forest, or a reclamation site.

21. That, with regard to each instance in which Respondent applied domestic septage to agricultural land in McComb County, Ohio, as identified in Paragraph 16, Respondent failed to document in any record how he met the pathogen requirements of 40 C.F.R. § 503.15(b).

22. That, with regard to each instance in which Respondent applied domestic septage to agricultural land in McComb County, Ohio, as identified in Paragraph 16, Respondent failed to certify in any record that he met the pathogen requirements of

40 C.F.R. § 503.15(b).

23. That, with regard to each instance in which Respondent applied domestic septage to agricultural land in McComb County, Ohio, as identified in Paragraph 16, Respondent failed to meet the pathogen requirements of 40 C.F.R. § 503.32(c)(1) or (c)(2), as required by 40 C.F.R. § 503.15(b).

24. That Respondent's failure to meet the pathogen requirements of 40 C.F.R. § 503.15(b), as identified in Paragraph 23, constitutes violations of Section 405(e) of the CWA, 33 U.S.C. § 1345(e), subjecting Respondent to civil penalties under Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1).

Count III

Failure to Meet Vector Attraction Reduction Requirements (40 C.F.R. § 503.15(d))

25. Paragraphs 1-24 are incorporated herein by reference.

26. That 40 C.F.R. § 503.15(d) provides that the vector attraction reduction requirements of 40 C.F.R. § 503.33(b)(9), (b)(10), or (b)(12), shall be met when domestic septage is applied to agricultural land, forest, or a reclamation site.

27. That, with regard to each instance in which Respondent applied domestic septage to agricultural land in McComb County, Ohio, as identified in Paragraph 16, Respondent failed to document in any record how he met the vector attraction reduction requirements of 40 C.F.R. § 503.33 (b)(9), (b)(10) or (b)(12).

28. That, with regard to each instance in which Respondent applied domestic septage to agricultural land in McComb County, Ohio, as identified in Paragraph 16, Respondent failed to certify in any record that he met the vector attraction reduction

requirements of 40 C.F.R. § 503.33(b)(9), (b)(10) or (b)(12).

29. That, with regard to each instance in which Respondent applied domestic septage to agricultural land in McComb Count, Ohio, as identified in Paragraph 16, Respondent failed to meet the vector attraction reduction requirements of 40 C.F.R. § 503.33(b)(9), (b)(10) or (b)(12), as required by 40 C.F.R. § 503.15(d).

30. That Respondent's failure to meet the vector attraction reduction requirements of 40 C.F.R. § 503.15(d), as identified in Paragraph 29, constitutes violations of Section 405(e) of the CWA, 33 U.S.C. § 1345(e), subjecting Respondent to civil penalties under Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1).

Count IV

Failure to Apply Septage at the Required Agronomic Rate (40 C.F.R. § 503.14(d))

31. Paragraphs 1-30 are incorporated herein by reference.

32. That, with exceptions not here applicable, 40 C.F.R. § 503.14(d) provides that "[b]ulk sewage sludge shall be applied to agricultural land, forest, a public contact site, or a reclamation site at a whole sludge application rather than is equal to or less than the agronomic rate for the bulk sewage sludge[.]"

33. That a pre-condition for determining the required agronomic rate for the application of sewage sludge to agricultural land, forest, a public contact site, or a reclamation site, is a knowledge of the size of the acreage of the parcel to which the sewage will be applied, and of the nitrogen required for the crop or vegetation grown on the parcel. 40 C.F.R. § 503.11(b) and § 503.13(c).

34. That in applying domestic septage to agricultural land in McComb County,

Ohio, as identified in Paragraph 16, Respondent failed to determine the size of the acreage of the parcel to which he was applying the septage, as well as the nitrogen required for the crop or vegetation grown on the parcel.

35. That in applying domestic septage to agricultural land in McComb County, Ohio, as identified in Paragraph 16, Respondent failed to comply with applicable agronomic rate, as set forth at 40 C.F.R. § 503.14(b).

36. That Respondent's failure to comply with the applicable agronomic rate in applying domestic septage to agricultural land in McComb County, Ohio, as identified in Paragraph 35, constitutes violations of Section 405(e) of the CWA, 33 U.S.C. § 1345(e), subjecting Respondent to civil penalties under Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1).

PROPOSED CIVIL PENALTY

Pursuant to section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), the Administrator may assess a Class II civil penalty not to exceed \$10,000 per day for each day during which a violation continues, not to exceed \$125,000 for violations of section 405 of the CWA, 33 U.S.C. § 1345. In 1990, Congress enacted the Debt Collection Improvement Act of 1986, Pub. L. 101-410, 104 Stat. 890 (November 5, 1990), as amended, Pub. L. 104-134, Title III, § 31001(s)(1), 110 Stat. 1321-1373 (April 26, 1996), which authorizes federal agencies which collect penalties pursuant to statutory authority to adjust their statutory maximum penalties by rule, to account for inflation. Effective January 31, 1997, EPA modified the statutory maximum penalty under 309(g) of the CWA, 33 U.S.C. § 1319(g), increasing the maximum penalty per violation to \$11,000, and the maximum penalty per action to \$137,500. See 40 C.F.R.

Part 19. Effective March 15, 2004, EPA modified the statutory maximum penalty under 309(g) of the CWA, 33 U.S.C. § 1319(g), increasing the maximum penalty per action to \$157,500. *Id.*

In Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), Congress provides that, “[i]n determining the amount of any penalty assessed under this subsection, the Administrator . . . shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.”

In determining the penalty amount proposed in this Administrative Complaint, the Administrator’s delegated complainant has analyzed the known evidence in this case, in consideration of the penalty criteria identified at Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3).

In considering the “economic impact” of the proposed penalty on Respondent, Complainant has presumed that Respondent does have an ability to pay the penalty amount. However, should Respondent make available to Complainant relevant and credible financial records which demonstrate that it does not have an ability to pay the amount of penalty proposed, Complainant will set aside the presumption and reduce the amount of penalty proposed, consistent with what is revealed in Respondent’s financial records. Likewise, should Respondent provide Complainant credible information relevant to any other issue regarding the appropriate amount of penalty, on review of that information Complainant will amend the amount of penalty proposed if, and as, warranted.

Consequently, in this Administrative Complaint, **the Administrator's Delegated Complainant proposes that a total penalty of \$102,000 be assessed by the Administrator for the violations of Respondent identified in the Amended Administrative Complaint.**

Respondent may resolve this proceeding at any time by paying the proposed penalty by certified or cashier's check, payable to "Treasurer, the United States of America," delivered to:

United States Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, Missouri 63197-9000

Respondent must include the case name and docket number on the check and in the letter transmitting the check. Respondent simultaneously must send copies of the check and transmittal letter to:

Richard R. Wagner
Senior Attorney
Office of Regional Counsel (C-14J)
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

Valdis Aistars
Water Enforcement and Compliance Assurance Branch
(WC-15J)
Water Division
U.S. EPA Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

NOTICE OF OPPORTUNITY TO REQUEST A HEARING

Congress has provided that, before issuing an order assessing a Class II civil penalty under Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1219(g)(2)(B), except as otherwise provided in Section 309(g) of the CWA, 33 U.S.C. § 1219(g), a Class II civil penalty shall be assessed and collected in the same manner, and subject to the same provisions, as in the case of civil penalties assessed and collected after notice and opportunity for a hearing on the record in accordance with section 554 of Title 5.

Consequently, you have the right to request a hearing to challenge the facts alleged in the Administrative Complaint and the amount of civil penalty it is proposed the Administrator assess. Any hearing and pre-hearing matter will be governed in accordance with the provisions of the Administrative Procedure Act, 5 U.S.C. §§ 551 et seq., and the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits," 40 C.F.R. Part 22 (July 1, 2000) ("the Administrator's Rules"). A copy of the Administrator's Rules accompanies this Complaint.

If you wish to avoid being found in default, you must file a written answer to the Complaint with the Regional Hearing Clerk (R-19J), EPA, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604-3590, within thirty (30) days of your receipt service of this Complaint. 40 C.F.R. § 22.15(a). In counting the 30-day time period, the actual date of receipt is not included. Saturdays, Sundays, and federal legal holidays are included in the computation. If the 30-day period expires on a Saturday, Sunday or

federal legal holiday, the time period is extended to include the next day which is not a Saturday, Sunday or federal legal holiday. 40 C.F.R. § 22.7(a).

By rule, the Administrator provides that your Answer must clearly and directly admit, deny or explain each of the factual allegations contained in the Administrative Complaint with respect to which you have any knowledge, or, where you have no knowledge of a particular factual allegation, so state.

40 C.F.R. § 22.15(b). The Administrator further provides that your Answer must also state:

- 1. The circumstances or arguments that you allege constitute the grounds of defense;**
- 2. The facts that you dispute;**
- 3. The basis on which you dispute the proposed relief, that being the amount of penalty proposed; and**
- 4. Whether you request a hearing.**

40 C.F.R. § 22.15(b). Your failure to admit, deny or explain any material factual allegation in the Complaint will constitute an admission of the allegation.

40 C.F.R. § 22.15(d).

You should further note that the Administrator's Rules provide that any hearing that shall be held will be a "hearing upon the issues raised by the complaint and answer." 40 C.F.R. § 22.15(c). Consequently, your failure to raise an issue in your answer may preclude you from addressing the issue at any hearing which may be held.

A copy of the Answer, and any subsequent documents filed by you in this action, should be sent to Richard R. Wagner, Senior Attorney, Office of Regional Counsel (C-29A), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604-3590. Mr. Wagner's telephone number is (312) 886-7947.

Notwithstanding any request you may make for a hearing, if you fail to file an answer within thirty (30) days of your receipt of this Complaint, the Regional Administrator or Presiding Officer may issue a Default Order. 40 C.F.R. §22.15(a); 40 C.F.R. § 22.17. Issuance of this Default Order will constitute a binding admission of all facts alleged in the Complaint and a waiver of your right to a hearing on those factual allegations. Any civil penalty determined appropriate in the Default Order shall then become due and payable, without further proceedings, on becoming a final order under 40 C.F.R. § 22.27(c). In addition, the default penalty is subject to the provisions relating to imposition of interest, penalty and handling charges set forth in the Federal Claims Collection Act of 1966, 31 U.S.C. § 3717. Interest will accrue on the default penalty at the rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717. EPA will impose a late payment handling charge of \$15.00 after thirty (30) days, with an additional charge of \$15.00 for each subsequent 30-day period over which an unpaid balance remains. In addition, U.S. EPA will apply a six (6) percent per annum penalty on any principal amount not paid within ninety (90) days of the date that the Default Order is signed by the Regional Administrator or Presiding Officer.

SETTLEMENT CONFERENCE:

Whether or not Respondent requests a hearing, Respondent may request an informal settlement conference to discuss the facts of this proceeding and to arrive at a settlement. To request an informal settlement conference, Respondent should contact:

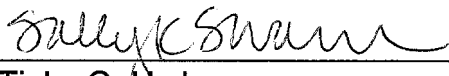
Mr. Valdis Aistars; Water Division (WC-15J); EPA, Region 5; 77 West Jackson Boulevard; Chicago, Illinois 60604-3590. You may also telephone Mr. Aistars at (312) 886-0264.

Respondent's request for an informal settlement conference does not extend the 30 calendar day period for filing a written answer to this complaint. Respondent may pursue simultaneously the informal settlement conference and the adjudicatory hearing process.

EPA encourages all parties facing civil penalties to pursue settlement through an informal conference. EPA, however, will not reduce the penalty simply because the parties hold an informal settlement conference.

CONTINUING OBLIGATION TO COMPLY

Neither the assessment nor payment of a civil penalty will affect Respondent's continuing obligation to comply with the Act and any other applicable Federal, state, or local law.

By: 
for Tinka G. Hyde
Acting Director, Water Division

Dated: June 12, 2008

CWA-05-2008-0004

CERTIFICATE OF SERVICE

I hereby certify that the original and one copy of this Administrative Complaint were filed with the Regional Hearing Clerk on JUN 18 2008, and that a true and correct copy was mailed along with a copy of the Consolidated Rules of Practice to the addressees as follows:

CERTIFIED MAIL 7001 0320 0006 1454 1400
RETURN RECEIPT REQUESTED

Mr. Michael Aukerman d/b/a
Michael Aukerman Excavating
3180 County Road 203
McComb, Ohio 45858

Date: JUN 18 2008

CERTIFIED MAIL 7001 0320 0006 1454 1394
RETURN RECEIPT REQUESTED

Mark Mann, Supervisor
Enforcement Unit - Division of Surface Water
Ohio Environmental Protection Agency
P.O. Box 1049
Columbus, OH 43216-1049

Date: JUN 18 2008

Denise Moore
U.S. Environmental Protection Agency
Region 5
77 West Jackson, WC-15J
Chicago, Illinois 60604

CWA-05-2008-0004

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